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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 516

THE SUPERIOR OIL COMPANY,

and

J. RAY McDERMOTT & CO., INC.,

Cross-Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

Supreme Court of the United States

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J. RAY McDERMOTT & CO., INC.,

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Superior Oil Company and J. Ray McDermott & Co., Inc., Cross-Petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit styled *"Pan American Petroleum Corporation, et al.*, Petitioners, v. *Federal Power Commission,* Respondent", Nos. 7912, et al. issued March 9, 1967, rehearing therein being denied May 22, 1967. Previous petitions for certiorari from this same judgment and decision are now pending before this Court on behalf of the Federal Power Commission[1] and on behalf of Long Island

[1] No. 227, October Term 1967, styled *Federal Power Commission,* Petitioner v. *Pan American Petroleum Corporation, et al.*, to which reference is hereinafter made as "FPC Pet."

Lighting Company, Philadelphia Electric Company, and Public Service Commission of the State of New York.[2] Other than the named Petitioners who will be Cross-Respondents hereto, the following parties were parties in the proceeding below:

Pan American Petroleum Corporation

E. Cockrell, Jr.

Continental Oil Company

Freeport Sulphur Company

General American Oil Company of Texas

Placid Oil Co., Margaret Hunt Hill, Trustee for Hassie Hunt Trust

H. L. Hunt, Hunt Oil Company

Shell Oil Company

U. S. Oil of Louisiana, Inc.

Philadelphia Gas Works Div. of The United Gas Improvement Company

Opinions Below

The opinion of the Court of Appeals below is reported at 376 F. 2d 161 with the opinion denying rehearing reported at 376 F. 2d 173. The opinion of the Federal Power Commission herein *sub nom Union Texas Petroleum, et al.*, Docket Nos. G-13221, et al., is reported at 32 FPC 254 with opinion denying rehearing with modifications reported at 32 FPC 1358.

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[2] No. 415, October Term 1967, styled *Long Island Lighting Co., Philadelphia Electric Company, and Public Service Commission of the State of New York*, Petitioners, v. *Pan American Petroleum Corporation, et al.*

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sec. 19(b) of the *Natural Gas Act,* 15 U.S.C. 717r(b). The original opinion[3] and judgments[4] of the Court of Appeals herein were entered March 9, 1967. Petitions for rehearing of that opinion on behalf of these Cross-Petitioners and other parties were denied May 22, 1967.[5]

Statute Involved

The statute here involved is the *Natural Gas Act,* June 21, 1938, C. 556, 52 Stat. 821-833 as amended, 15 U.S.C. 717-717w. The pertinent provisions are set forth in FPC Pet. Pages 2-3.

Questions Presented

1. MAY THE COMMISSION ON THE BASIS OF AN EVIDENTIARY RECORD WHICH SHOWS THAT ALL CERTIFICATED FEDERAL DOMAIN GAS SALES OFFSHORE SOUTH LOUISIANA UNDER CONTRACTS DATED SUBSEQUENT TO 1956 WERE CERTIFICATED AT PRICES HIGHER THAN 18.5¢ PER MCF FIND 18.5¢ PER MCF TO BE THE "IN-LINE" PRICE FOR SUCH A FEDERAL DOMAIN SALE MADE UNDER A CONTRACT DATED APRIL 27, 1960?

2. MAY CONTEMPORANEOUS PRICES WHICH THE FEDERAL POWER COMMISSION HAS PERMANENTLY CERTIFICATED AS REQUIRED BY PUBLIC CONVENIENCE AND NECESSITY, NOT SUBJECT TO ANY INFIRMITY, AND NOT AP-

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[3] FPC Pet., Appendix "A", pp. 8-28, incl.

[4] FPC Pet., Appendix "C", pp. 37, 38.

[5] FPC Pet., Appendix "B", pp. 29-33, incl.

PROVED ON ANY BASIS WHICH THE COURTS HAVE EVER FOUND ERRONEOUS, BE IGNORED IN DETERMINING AN "IN-LINE" PRICE?

Statement of the Case

This case raises for review the validity of an in-line finding by the Federal Power Commission related to Federal domain gas sales under contracts dated April 27, 1960 which the court below affirmed.

The Commission found no substantial evidence to show that its prior determinations[6] of an onshore South Louisiana "in-line" price should be changed and held that said onshore base "in-line" price of 18.5¢ per Mcf should also apply to Federal domain sales between January 1, 1960 and December 31, 1962.

The court below affirmed as to the Federal domain in-line price finding and as to the onshore base "in-line" price finding but reversed and remanded as to the tax reimbursement to be added to the onshore base "in-line" price.

Cross-Petitioners here complain only of the "in-line" finding made as to their April 27, 1960 Federal domain gas sale contracts, as to which for the relevant period the Commission pointed to some eight (8) temporary certifications at prices ranging from 19.5¢ per Mcf to 21.5¢ per Mcf involving together more than 20,000,000 Mcf of annual sales. By restricting its time periods on the basis of the issuance of Statements of General Policy and amendments thereto,

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[6] *Continental Oil Co.*, Docket No. G-11024, et al. (CATCO), 27 FPC 96; *Placid Oil Co.*, Docket No. G-13183, (Placid), 30 FPC 283, reversed *sub nom Callery Properties, Inc., et al.* v. *Federal Power Commission*, 335 F. 2d 1004, affirmed *sub nom United Gas Improvement Co.* v. *Callery Properties, Inc., et al.*, 382 U.S. 223; *United Gas Pipe Line Company* (United), 30 FPC 329.

the Commission found no permanent certifications to consider.[7] The Commission made no reference whatsoever to prices it had permanently certificated in settlement proceedings.

The court below noted that "apparently" certificated prices in settlement cases "were deemed suspect" and also ignored them in affirming the Commission finding as to relevant prices to constitute a line for Federal domain sales (FPC Pet. App. "A", p. 13, FN 6).

The fact is that the Staff Witness' Exhibit No. 1,[8] which formed the basis for all of his testimony and the findings of the Commission, shows in Schedule 3 thereof that during the relevant period 1957-1960 there were 12 permanent certifications, ten of which were at 19¢ per Mcf covering more than 35,000,000 Mcf of annual sales, one at 18.75¢ per Mcf covering 14,500,000 Mcf and one under a 1960 contract at 19.5¢ per Mcf covering over 1,500,000 Mcf of annual sales. These were settlement cases.

There is no basis whatsoever for deeming certificate orders approving settlement prices "suspect". Such orders state, and do in fact represent, Commission findings of what is required by public convenience and necessity to the same extent that any other certification order does. The court

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[7] Staff Witness testified as to two such permanent certificates both under 1958 contracts and each at 22¢ per Mcf but considered them "suspect" and testified as to a price line of 18.5¢ per Mcf on the basis of four contracts dated in August 1956 certificated at that price. Any consideration of the Statement of General Policy would indicate an in line price of 19.5¢ per Mcf, and it clearly recognizes that prices for Federal domain production should be higher than the same on shore prices by at least .55¢ per Mcf.

[8] A part of the record below filed directly by stipulation as a part of the joint appendix in lieu of reprinting because of its large size.

below referred to a statement by the Examiner that said orders were of "doubtful validity". It failed to read the full statement. He said *not* to consider them in determining the price line was of doubtful validity (J.A. 280-281) and in fact pointed out the settlement formula involved which renders those prices in all respects comparable (except more favorable as to amount, and refund of only 66⅔ of excess collections) with the instant sales.

Reasons For Granting The Writ

Since the announcement by this Court in *Atlantic Refining Co.* v. *Public Service Com. of N. Y.*, 360 U.S. 378, of the in-line price concept the Commission and the courts have wrestled with its application. This Court should interpret its own meaning of a concept which has been characterized as "artificial", *Public Service Com. of N. Y.* v. *Federal Power Com.*, 373 F. 2d 816, 825.

Perhaps the only consistent rulings by the Commission and the courts in dealing with this artificial concept is that, first, the price line fixed must reflect current conditions and substantial sales in interstate commerce and, second, that prices subject to revision in the same proceeding by the Commission or the courts and those reached by methods subsequently found erroneous are suspect. *United Gas Improvement Co.* v. *Federal Power Com.*, 283 F. 2d 817, cert. den. *The Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879.

Here the court below refused to consider permanently certificated prices, current in time with the sales at issue and involving substantial quantities of sales in interstate commerce, and thus placed itself in conflict with not only the *United Gas Improvement case, supra,* but with its own recent decision in *Sunray DX Oil Co., et al.* v. *Federal Power Com.*, 390 F. 2d 181, decided only last December.

It would broadly hold all current conditions in South Louisiana to be "suspect" in a sense. Whatever this means, when a court deems permanently certificated prices found by the Commission to be required by the public convenience and necessity, after scrutiny, and on principles not disapproved by any court but in fact lauded by it,[9] to be suspect and irrelevant for in-line determinations, it has grieviously erred.

CONCLUSION

For the foregoing reasons this Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 17, 1967

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[9] "Settlement agreements are a recognized and judicially encouraged instrument to provide both a semblance of price stability to producers and to mitigate against delay to the consumer interest." FPC Pet. App. "A", p. 19.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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v.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 516

THE SUPERIOR OIL COMPANY and
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v.

FEDERAL POWER COMMISSION, ET AL.

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. App. A, pp. 8-28)[1] is reported at 376 F. 2d 161., The court's opinion on rehearing (FPC Pet. App. B, pp. 29-33) is reported at 376 F. 2d 173. The order and

[1] "FPC Pet. App." refers to the appendices to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. 227, this Term.

opinion of the Federal Power Commission (J.A. 337-392)[2] is reported at 32 F.P.C. 254, and its opinion and order on rehearing (J.A. 456-467) is reported at 32 F.P.C. 1358.

JURISDICTION

The judgments of the court of appeals (FPC Pet. App. C, pp. 37-38) were entered on March 9, 1967. Petitions for rehearing were denied on May 22, 1967. The cross-petition for a writ of certiorari was filed on August 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether, in determining in-line prices at which to certificate sales of gas by independent producers, the Commission may go below prices at which it had previously certificated other sales pursuant to settlement agreements.

STATEMENT

This cross-petition involves the same court of appeals decision of which we seek review, on another issue, in No. 227, this Term.

The proceedings before the Commission involved sales of natural gas made by independent producers from the South Louisiana area, both onshore and offshore, under contracts executed between 1947-1962

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[2] "J.A." refers to the joint appendix filed in the court below.

(J.A. 353). The principal controversy concerned the maximum price at which the gas could initially be sold (the "in-line" price) pending the establishment of just and reasonable rates under Sections 4 and 5 of the Natural Gas Act. Among the sales involved were the instant petitioners' two sales of offshore Louisiana gas produced in the federal domain. Petitioners' contracts, dated April 27, 1960, specified initial contract prices of 21.5 cents.

The Commission fixed the in-line price at 18.5 cents per Mcf for gas (like petitioners') produced from offshore wells in the federal domain and at 20 cents per Mcf for gas produced from wells subject to the taxing jurisdiction of Louisiana. The Commission explained (1) that it had previously found the same prices to be in line in certificating other South Louisiana sales under contracts executed in the years 1956-1959;[3] (2) that the evidence in this case with respect to the same years was substantially similar to that previously relied upon (J.A. 356); (3) and "that once an in-line price has been established for an area, it shall be presumed to continue until sufficient evidence is presented that there has been a change." (J.A. 355.) In the Commission's view, no showing had been made warranting a departure from the 18.5 cent offshore line previously established by the Com-

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[3] *Continental Oil Co.*, 27 F.P.C. 96; *Placid Oil Co.*, 30 F.P.C. 283, affirmed *sub nom. United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223; *United Gas Pipe Line Co.*, 30 F.P.C. 329, petition for review dismissed *sub nom. Gulf Oil Corp.* v. *Federal Power Commission*, 330 F. 2d 824 (C.A. 5).

mission with respect to pre-1960 sales, and approved by this Court in *Callery*, n. 3, *supra* (J.A. 360-361).

The court of appeals affirmed the Commission's 18.5 cent offshore in-line price (FPC Pet. App. A, pp. 11-19), but remanded the case for further explanation of the basis for the 20-cent onshore price (FPC Pet. App. A, pp. 19-22). The court also held that the Commission had no power to require refunds in the absence of an express refund condition in a temporary certificate and accordingly set aside the Commission's deferral of the refund question (FPC Pet. App. A, pp. 24-28). In so ruling, it relied on its previous decision in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, pending on petitions for certiorari, Nos. 60, 61, 62, and 82, this Term. Our petition in No. 227, this Term, and the petition of the consumer-distributor group in No. 415, this Term, seek review of the court's refund decision; no party has sought review of the court's remand with respect to the onshore in-line determination.

ARGUMENT

1. Petitioners' contention that the Commission should have fixed the in-line price for offshore Louisiana sales above 18.5 cents, because other sales had previously been permanently certificated at higher prices under settlement agreements, is foreclosed by this Court's recent decision in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223. The Court there expressly approved the offshore South Louisiana in-line price of 18.5 cents of which

petitioners now complain, 382 U.S. at 229, albeit, as here, the Commission had declined to give controlling effect to higher settlement prices.[4]

The Commission had stated in its opinion on rehearing in *Callery* (30 F.P.C. 682, 683):

> * * * The fact that [the in-line] price is lower than the price at which the settlements have been effected itself affords no basis for objection, nor does it support the assertions that our failure to fix a price equal to that allowed in the settlements is in any way [unlawful]. * * *

As the Commission explained, settlements always reflect a compromise of positions, and consumer interests may agree to a price that would otherwise be excessive merely to avoid protracted litigation. The court of appeals, concluding that the Commission's entire approach to the price question was erroneous because of the exclusion from evidence of certain cost and economic data, *Callery Properties, Inc.* v. *Federal Power Commission*, 335 F. 2d 1004 (C.A. 5), chose not to express any opinion on the producers' contention that the 18.5 cent price (335 F. 2d at 1020) "failed to give proper weight to prices approved by the Commission's own settlements in similar cases." But that contention, along with a variety of similar producer attacks on the Commission's application of

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[4] Six of the 12 settlement prices relied upon by the instant petitioners were certificated in settlements specifically referred to by the Commission in *Callery*. See 30 F.P.C. at 285. In effect, petitioners are seeking to reargue not only the principles established in the *Callery* case (to which they were parties), but the very price there determined.

the "suspect price doctrine", was necessarily rejected by this Court's holding that (382 U.S. at 229) "[t]he 'in-line' price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not 'suspect' * * *."

At all events, petitioners' contention that settlement prices must be considered was not raised in their applications for rehearing to the Commission and may not, therefore, be considered by this Court. Natural Gas Act, Section 19(b), 15 U.S.C. 717r(b); *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649-651.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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The Brief in Opposition makes two points: first, that the petitioners' contentions are foreclosed by this Court's decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223; second, that the question presented by the petition was not raised by the petitioners in their applications for rehearing to the Commission.

1. The Brief in Opposition misinterprets the questions presented by the petition and erroneously restates the petitioners' contentions. By so doing, it

is able to urge that the restated "contentions" have been foreclosed by this Court's holding in *Callery*. But even as restated, the contentions regarding settlement prices are not foreclosed because *Callery* did *not* pass upon the effect to be given settlement prices since the issue was not before the Court, not having been passed upon by the Court of Appeal.

The petitioners have restricted their complaint here to their April 27, 1960, Federal domain gas sales contracts. The Court below affirmed the Commission in finding a price "line" for the period January 1, 1960, to October 25, 1960, of 18.5c for on-shore sales, which it applied to Federal domain sales between January 1, 1960, and December 31, 1962. In order to do this, the Commission had (a) excluded from consideration 1958 permanent certificates affecting the Federal domain area, (b) disregarded eight contemporary temporary certificates at higher prices affecting the Federal domain area, and (c) did not use at all in its calculations a number of permanent certifications during the relevant period at prices higher than 18.5c, which were the result of settlements.

Thus, the evidence in the record showed that *all* certificated Federal domain offshore South Louisiana sales dated subsequent to 1956 were certificated at prices higher than 18.5c per Mcf, and that during the relevant period 1957-1960, there were twelve permanent certifications, ten at 19c per Mcf covering more than 35,000,000 Mcf of annual sales, one at 18.75c per Mcf covering 14,000,000 Mcf and one at 19.5c per Mcf

covering 1,500,000 Mcf of annual sales, these latter occurring in settlement cases (Petition, pp. 4-5). In other words, if the Commission had considered the evidence in the record relevant to offshore sales it could not have arrived at a "line" as low as 18.5c. The lower court misconstrued the record in approving the Commission's disregard of settlement prices (see Petition, pp. 5-6), and therefore compounded the error.

Callery did not, and could not have passed upon these issues, because they did not exist in relation to the *Callery* record. They do exist here.

2. Petitioners *did* raise the questions here presented in their application to the Commission for rehearing. (See Superior's application, pars. 9 and 10, R. 402; McDermott's application, pars. 3(a), (b), (e), 4, R. 446-9) These were raised in a context of challenging both onshore and offshore determinations and covered the exclusion of the permanently certificated settlement prices and other certificated prices which the Commission, following the Presiding Examiner, had ignored. The fact that petitioners, in the light of the later action of the Court of Appeal, here chose to complain only of the "in line" findings made as to their 1960 Federal domain contracts does not devitalize the broader challenge levelled in the rehearing applications.

CONCLUSION.

It is respectfully submitted that the petition should be granted.

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